JUN 2 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 404.

THE BALTIMORE & OHIO RAILROAD COMPANY, WILLIAM W. WHEELOCK and WILLIAM G. BIERD, Receivers of the CHICAGO & ALTON RAILROAD COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, ILLINOIS TRACTION, INC.; ILLINOIS CENTRAL RAILROAD COMPANY, LITCHFIELD & MADISON RAILWAY COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, MOBILE & OHIO RAILROAD COMPANY, THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, the PENNSYLVANIA RAILROAD COMPANY, SOUTHERN RAILROAD COMPANY and WABASH RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

Appellees.

PETITION FOR REHEARING AND MODIFICATION OF OPINION.

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EDWARD J. WHITE,
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PETITION FOR REHEARING AND MODIFICATION OF OPINION.

Now come the Chicago, Rock Island and Pacific Railway Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company and St. Louis-San Francisco Railway Company, appellees in the above case, and respectfully petition the Court for a rehearing and for a modification of the opinion herein for the reasons hereinafter set forth.

I.

Appellants, in their brief before this Court, stated that the west-side lines invoked the jurisdiction of the Interstate Commerce Commission by presenting the question "solely as one involving a practice" (Appellants' Brief, p. 2, line 31), and the Court *seems to have assumed that the case was submitted solely as one involving a practice.* The appellees did not submit this case to the Interstate Commerce Commission "solely as one involving a practice," because they relied not only upon Paragraph 1 of Section (15) of the Interstate Commerce Act, which relates to "practices," but also upon paragraph 3 of section (3), paragraphs 3 and 4 of section (1), paragraphs 10 and 11 of section (1), and paragraph 3 of section (15) of the act, which *do not relate to "practices."*

The ultimate legal question before the Court is:

(a) Whether the Commission had the power, under *any of* the provisions of the Interstate Commerce Act, to compel the east-side lines to "bear the expense incident to the transfer across the Mississippi River from East St. Louis, Illinois, to St. Louis, Missouri, of practically all carload and less-than-carload through freight," and

(b) Whether there was substantial evidence in the record to support the order.

First dealing with paragraph (a), *supra,* if the Commission has the power under any of the provisions of the act, then it is immaterial whether it is a "practice," or

an "arrangement," or a "usage," or any other synonymous term. Under paragraphs 3 and 4 of section (1) of the act it is the duty of carriers to furnish and provide transportation, and the term "transportation" includes all services in connection with the receipt, *delivery* and transfer in transit of property transported. These two paragraphs do not relate to "practices." The Commission ordered the east-side lines to deliver the traffic on the rails of the west-side lines by absorbing the switching charges of their joint agent, the Terminal Railroad Association. This is nothing more or less than the fulfillment of their duties as initial carriers under the common law. In Myrick v. Michigan C. R. Co., 107 U. S. 102, l. c. 106, this Court said:

> "If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own lines, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods *to such line*—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line."

The foregoing quotation was also cited with approval by this Court in Texas & Pacific v. Reiss, 183 U. S. 621, l. c. 626, and in 10 Corpus Juris 534 the rule is stated as follows:

> "Where goods are to be transported to a point beyond the terminus of the initial carrier it is the

> duty of such carrier to *deliver* the goods *to the connecting carrier,* to be forwarded on its line, within a reasonable time, and in good condition for transportation."

Again, the provisions of paragraph 3 of section (3) of the act, which does not relate to "practices," give the Commission ample power to deal with the situation and to order the east-side lines to participate in the expense and burden of interchanging through freight. That section requires all carriers to afford reasonable, proper and equal facilities for the interchange of traffic and for the receiving, forwarding and delivering of property to and from their several lines or those that connect therewith. The east-side lines refused to afford such reasonable and equal facilities in that they compelled the west-side lines to furnish all of the facilities of interchange in both directions. The rails of the Terminal are the "facilities" used for interchange. It collects a switching charge for each car so interchanged, but this is simply a financial arrangement of prorating the cost of the Terminal's maintenance and operation (Richmond Chamber of Commerce v. Seaboard A. L. Ry. Co., 44 I. C. C. 455, l. c. 460). The equality of interchange was not maintained under the former arrangements because the east-side lines did not participate to any extent in the absorption or payment of these charges. They did not, therefore, furnish equal and reasonable facilities for the interchange of traffic on which they received line-haul rates and charges.

Furthermore, the provisions of paragraph 4 of section (1) of the act upon which appellees relied, authorized the Commission to make the order, because the arrangements in effect prior to the order of the Commission governing the interchange of through transriver freight constituted a plain violation of the provisions of paragraph 4 of section (1) of the act in that the east-side lines refused to provide reasonable facilities for operating through routes to St. Louis, the end of their respective lines, and to "make reasonable rules and regulations with respect to the operation of such through routes." This paragraph does not deal with "practices." By virtue of their ownership, control and perpetual right to the joint use of the rails of the Terminal the east-side carriers now fully recognize that their respective lines end at St. Louis and they should, therefore, as a matter of law, operate through routes to that point on westbound traffic, for the compensation on the traffic involved herein is exactly the same as it is on a local shipment to St. Louis.

As those provisions of the Interstate Commerce Act not relating to "practices" amply sustain the power of the Interstate Commerce Commission to compel the east-side lines to participate in the burden and expense of interchanging through traffic, the further question arises whether there was substantial evidence in the record to support the order of the Commission. On this point this Court said:

> "There was nothing to support a finding that it is or will be unjust or unreasonable for the appellee lines to bear the cost of the westbound through traffic. The order cannot be sustained."

Appellees respectfully submit that the order of the Commission was supported by substantial evidence, and we will here give a brief summary of the facts in the record supporting the order.

First. When the east-side lines, commencing in 1905 and ending in 1908, recognized St. Louis as a station on their lines by increasing their St. Louis-East St. Louis rate from 116 to 117 per cent, they did then, have ever since and do now apply those increased rates to the relatively greater amount of through traffic involved herein (Witness Adams, Rec., p. 367; Witness Nash, Rec., p. 342).

Second. Since 1906 the record before the Commission disclosed that the rates of the east-side lines to St. Louis-East St. Louis have been increased on the average of about 100 per cent (Nash's Ex. No. 672, Rec., p. 616, Appendix A, infra).

Third. The record before the Commission disclosed that the railway operating revenues and the net railway operating income of the east-side lines averaged $32,593 and $4,944, respectively, per mile of road, while the same revenues and income for the four west-side lines averaged only $16,900 and $2,826, respectively, per mile of road (Press' Ex. No. 77, Rec., p. 387).

Fourth. The east-side lines now maintain the same rates to St. Louis on local traffic that they maintain on the traffic involved herein to East St. Louis, but they refuse to perform the same service on the traffic involved herein that they do on the traffic moving locally to St. Louis. In other words, they furnish the facilities for and operate through routes to St. Louis, Missouri, on local traffic, but they refuse to furnish the facilities for and to operate through routes to St. Louis on traffic destined beyond, although their rates to the two towns are exactly alike.

Fifth. The east-side lines recognize the Terminal Railroad Association as their agent in performing the interchange switching on westbound through traffic by paying its per diem charges (Our Original Brief, p. 24).

Sixth. Officers of Eastern lines have admitted that the present arrangements are unfair and unjust. Mr. George H. Crosby, freight traffic manager of the Chicago, Burlington & Quincy Railroad Company, on April 7, 1908, wrote in part to Mr. W. B. Biddle, vice-president of the Frisco Lines, as follows (Ex. No. 5):

> "I think this whole question of transfer between St. Louis and East St. Louis should be disposed of on an equitable basis. As the matter stands today, the western line pays the transfer on both eastern and western business, *which is manifestly unfair,* and we are ready to co-operate with the other interested lines in bringing about a reformation in this respect."

A similar letter was written by Mr. George H. Ross, vice-president and general traffic manager of the Toledo,

St. Louis & Western Railroad Company (Our Original Brief, pp. 17-19). If a confession in a criminal case is sufficient to convict, certainly admissions of like nature before the Interstate Commerce Commission are sufficient to warrant an order.

Seventh. That there is a generally recognized practice on the part of the road-haul carriers to make delivery of through traffic on a designated track in the yards of the receiving carrier either by direct delivery or by using an intermediate switching line at its expense.

Eighth. That the east-side lines do furnish the facilities for and operate through routes to and from St. Louis, Missouri, on local traffic and do not furnish the facilities for nor operate through routes to St. Louis on traffic destined beyond.

Ninth. That the decree and operating contracts governing the maintenance and operation of the Terminal Railroad Association provide that any new company may become a member of the Terminal Railroad Association upon a plane of equality in respect of burdens and benefits, and that any company not electing to become a member may use all of its facilities upon as nearly equal plane as may be with respect to expenses and charges.

Tenth. That the east-side lines themselves, on all through traffic at East St. Louis, Illinois, other than trans-river through traffic, reciprocally bear the burden and expense of interchange thereon.

Eleventh. That the contract continuing the existence of the Terminal Railroad Association as their joint terminal and interchange facility contemplates that all carriers shall have equitable treatment in the matter of service, rights, accommodations, benefits, burdens, expenses and charges.

II.

Appellees respectfully submit that the opinion herein should be modified by eliminating therefrom the sentence in italic, to wit:

> "The appellee lines adopted the policy of absorbing the transfer charges in order to meet competition of the Alton and have since continued to divide joint rates and apply their St. Louis-East St. Louis rates in combination on that basis. *There is a strong presumption that the general level of their rates has been adjusted to include reasonable compensation for the services covered by them.*"

As well said by the Court in Burge v. Railroads, 244 Mo. 76, l. c. 95:

> "A presumption takes flight upon the appearance of the facts themselves. When the facts themselves are in evidence there is no place for a presumption as to those facts. A presumption is only indulged in in the absence of evidence as to the facts."

The record before the Interstate Commerce Commission conclusively discloses that the west-side lines are not being

compensated out of their rates and divisions for the river transfer service. Briefly summarized, the oral testimony and documentary evidence introduced by the appellees before the Commission showed that, although the west-side lines bore the burden and expense of transfer in both directions, they were neither fully compensated nor even partially compensated by the amounts received by them for their services in connection with such through traffic (Witnesses Leland, Rec., p. 328; Nash, Rec., p. 340; Adams, Rec., p. 366, and Haile, Rec., p. 323). A joint committee of the east-side and west-side lines, appointed at a meeting held on October 30, 1915, reported as follows:

> "Prior to the completion, in 1877, of the Chicago & Alton's bridge at Louisiana, Missouri, rates between points east and west of St. Louis-East St. Louis were made on the full combination of locals with the Mississippi River transfer charge added, the rates of the west-side lines applying to or from St. Louis and of the east-side lines from or to East St. Louis. With the completion of the Chicago & Alton bridge that line published the *St. Louis basis* of rates between *East St. Louis* and stations on its lines west of the Mississippi River, forcing the west-side lines to take similar action and *absorb* river transfer, as the through rates were necessarily based on East St. Louis, there being no rates published between St. Louis, Missouri, and points east of the Mississippi River" (Ex. No. 59, pp. 5, 6).

Furthermore, Mr. Maxwell, vice-president of the Wabash, and a leading witness for the east-side lines, testified (Rec., p. 274):

> "In 1877, when the Chicago & Alton completed its bridge at Louisiana, Missouri, it entered the traffic between St. Louis and the West via Louisiana, thus establishing *the St. Louis rates* between East St. Louis and points west of St. Louis, with the exception of a small portion of near-by territory west of the Mississippi River. All other western roads at St. Louis voluntarily met the action of the Chicago & Alton, and thus established between East St. Louis and all points west the St. Louis basis of rates, *which basis is still in effect.* * * * Conditions as to the Western roads under which St. Louis rates were made voluntarily by them from East St. Louis have also remained *unchanged to this day.*"

III.

The Court erred in holding that:

> "The same considerations apply in determining the reasonableness of the apportionment of revenues derived from combination rates as govern the division of joint rates. The merits of the changes made by the order cannot be determined without a consideration of facts substantially similar to those specified in paragraph (6) of section 15 relating to the division of joint rates."

There can be no division of combination rates already divided over a given junction point. The Commission

is not charged with the duty of dividing combination rates in cases where the revenue produced by each factor is retained by the respective carrier.

The rails of the Terminal Association constitute a joint facility by means of which traffic moving on combination of rates on St. Louis, Missouri, is interchanged between the lines forming such Terminal Association. A situation is presented similar to that which obtains at any junction point where two carriers interchange traffic by means of a connecting track.

Paragraph (3) of Section 3 of the Interstate Commerce Act provides that all carriers engaged in the transportation of passengers or property shall afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and it may be assumed that the Commission has authority to require the carriers to provide such facilities. The rails of the Terminal being a joint facility and in law the rails of the proprietary lines, this case should be decided upon the assumption that the rails of the Terminal are in fact the rails of the east-side and west-side lines. Certainly the Commission, in enforcing the provisions of paragraph (3) of section 3 of the act, would not be required to enter into the question of divisions.

IV.

The Court holds:

> "So all the revenues yielded by such rates, without deduction on account of charges for transfer, are re-

tained by the carriers in the territory east of the river. But the Commission's order requires the rates so by tariff provisions limited to East St. Louis to be extended to St. Louis. This operates to deduct the cost of transfer from their revenue. In effect, it is to require the cancellation of such tariff provisions, and to authorize a corresponding change in the tariffs of the appellee lines. It results that the controversy before the Commission involved divisions or portions of revenues derived from through traffic."

The foregoing holding is error in that it is stated that the effect of the order of the Commission would be to authorize a change in the tariffs of the appellee lines. As to traffic moving on rates which are a combination on St. Louis and East St. Louis, there would be no change in the present wording of the tariffs filed by the west-side lines.

As heretofore stated, the Court overlooks the fact that a requirement by the Commission that a carrier furnish proper facilities to effect interchange is not in law an apportionment or division of revenue.

V.

The Court holds as follows:

"The appellee lines adopted the policy of absorbing the transfer charges in order to meet competition of the Alton and have since continued to divide joint rates and apply their St. Louis-East St. Louis rates in combination on that basis. There is a strong pre-

sumption that the general level of their rates has been adjusted to include reasonable compensation for the services covered by them."

In connection with the foregoing finding we desire to call the attention of the Court to the fact that the strong presumption referred to should disappear upon the appearance of the facts. The Court itself finds that the appellee lines adopted the policy of absorbing the transfer charges in order to meet competition of the Alton, and the testimony in this case before the Commission shows that when such policy was adopted and the rates of the west-side lines extended to East St. Louis, there was no increase in such rates. This testimony establishes conclusively the fact that the west-side lines are not in any manner compensated as to the traffic here involved by accepting such traffic on the east bank of the river.

VI.

The Court finds as follows:

"Since the Alton opened its route to the west, the appellee lines have maintained the same rates from and to East St. Louis as from and to St. Louis, and about 1918, upon the insistence of the business interests of St. Louis, the lines east of the river published and have since maintained, with some exceptions that need not be specified, the same rates from and to St. Louis as from and to East St. Louis. This was done

by reducing the rates to and from St. Louis and by advancing most of the rates to and from East St. Louis."

The Commission could well find from the testimony that inasmuch as identically the same service is performed by the east-side lines in connection with traffic destined to St. Louis as is performed in connection with traffic destined to points beyond; that that fact in and of itself tended to show ample compensation to the east-side lines because of payment by those lines of the transfer charges on through traffic, especially since the east-side lines advanced the East St. Louis rate when that rate was extended to St. Louis.

We have this situation: Here are rates made on combination on St. Louis and East St. Louis. When the west-side lines extended the St. Louis rate to East St. Louis, there was no advance in the St. Louis rate, but when the east-side lines extended the East St. Louis rate to St. Louis there was an advance in the East St. Louis rate. This fact in and of itself will support a finding by the Commission that it is reasonable and proper for the east-side lines to transport through traffic to the ends of their lines at St. Louis.

Further, the fact that the east-side lines, having advanced the East St. Louis rate, are willing to extend that rate to St. Louis on traffic local to St. Louis, is persuasive that such east-side lines are amply compensated by deliv-

ering through traffic to west-side lines at St. Louis when the respective services are identical.

In view of the foregoing, we respectfully submit that the holding of the Court that there was nothing to support a finding; that it is, or will be, unjust or unreasonable for the appellee lines to bear the cost of transfer of westbound through traffic is error.

VII.

The Court erred in holding that the matters in controversy in both proceedings were purely financial and that there was no question concerning furnishing of facilities or the handling of traffic.

Inasmuch as through traffic only is involved, we refer to paragraph (4) of Section 1 of the Interstate Commerce Act, which provides in substance that it shall be the duty of every common carrier engaged in the transportation of passengers or property to establish through routes and provide reasonable facilities for operating them, and make reasonable rules and regulations with respect to the operation of such through routes; and in case of joint rates, fares or charges, to establish such reasonable and equitable divisions thereof as between the carriers subject to this act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

It will be observed that paragraph (4) referred to undertakes to deal with through routes over which there are

no joint rates, fares or charges, and with through routes over which there are joint rates, fares or charges. In the first instance the paragraph was undoubtedly intended to cover traffic moving on combination rates, and as to such traffic it was made the duty of the carriers to provide reasonable facilities, undoubtedly having in mind the delivery of such traffic by one carrier to another. This being true, the failure of a carrier to establish reasonable facilities for making such delivery is unquestionably a violation of said paragraph (4) and subjects the carrier at fault to the jurisdiction of the Interstate Commerce Commission to the end that that body may require the offending carrier to establish and maintain such reasonable and proper facilities.

It is unquestionably true that the rails of the so-called east-side lines extend to St. Louis, Missouri, either through direct ownership or through a joint ownership in the properties of the Terminal Railroad Association, the tracks of which are in law an extension of the rails of the east-side carriers. The rails of the Terminal are also an extension of the lines of the west-side carriers. That is to say, by reason of the existence of the Terminal it may be stated that the lines of the east-side carriers extend to St. Louis, Missouri.

The Court, in holding that there was no question concerning furnishing of facilities, overlooked the fact that if west-side lines are required to accept the traffic in question at East St. Louis through a payment of the transfer

charge, in law furnish the facilities for bringing such traffic across the river for delivery direct on the rails of the west-side lines. Unquestionably this is a furnishing of facilities by west-side lines and a failure on the part of east-side lines to furnish facilities for a delivery of westbound traffic to the end of their lines at St. Louis, Missouri.

The reception of such traffic at East St. Louis by the Terminal Company for the west-side lines, with the consequent payment therefor by the latter, results in law in the furnishing of facilities by the west-side lines in connection with such traffic.

A requirement, therefore, that the east-side lines deliver through westbound traffic to west-side lines at St. Louis is a requirement that such east-side lines furnish facilities therefor. In fact, the question of furnishing facilities and handling the traffic was one of the important questions to be passed upon by the Commission. It is the position of the east-side lines that if west-side lines do not furnish facilities necessary to transport through traffic from the east bank of the Mississippi River to the west bank that east-side lines are under no lawful obligation to do otherwise than deposit the traffic on the east bank of the river.

Evidently the provisions of paragraph (4) of Section 1 of the Interstate Commerce Act do not require that the Commission, before it can compel carriers to provide reasonable facilities for operating through routes in connec-

tion with traffic moving on combination rates to go into and make a finding as to divisions of such rates. In fact, we do not know how, in making such a finding, the Commission could divide rates that already divide at a junction point.

VIII.

After mentioning the fact, in the course of its opinion, that in the suit of the United States to dissolve the Terminal Railroad Association of St. Louis because it was an illegal combination in violation of the Sherman Antitrust Act, and, after having mentioned the fact that a final decree of this Court adjudicated that the said Terminal Association was an illegal combination in violation of the Sherman Antitrust Act (224 U. S. 383), in finally concluding that the Terminal Association could continue to exist while flagrantly violating the express condition prescribed as a condition for the continued existence of said illegal combination, the Court clearly failed to give effect to its former decision in the Government's case and held that, by violation of the terms of this Court's decree—which five Circuit Judges found had been in bad faith ever since such decree was rendered—the Court failed to recognize that no prescriptive right to violate the law can accrue through lapse of time.

In finding that the order of the Commission requires no change of divisions of revenues derived from traffic moving on joint rates, but that the order only shifts from the west-side lines to the carriers east of the river the burden

of transferring freight from the west to the east side of the river, the opinion is in error in concluding that any division of rates is involved, the whole charge being one of discrimination, in the violation of this Court's decree, in imposing the transfer charges of a joint facility upon a few of the proprietary lines, in violation of this Court's decree that all the users of the Terminal, proprietary and nonproprietary, should be treated upon a basis of equality.

In finding that the Terminal was jointly owned by the appellant and appellee lines, and that "*the arrangements for their use contemplate equal treatment of all carriers served by them,*" the Court erred in holding that the practice in violation of this "arrangement" was not an illegal practice, since it was also in violation of the decree of this Court in 224 U. S. 383-386.

In assuming that the discrimination indulged in, in the face of this Court's decree, for the past fourteen years—which five different United States Circuit Judges found had its foundation in bad faith on the part of the Terminal and the east-side lines—had ripened into a legal practice, although grossly discriminatory, because "*appellee lines, in order to enable them to compete with other railroads west of the Mississippi River,*" assumed such transfer charges, the Court overlooked the fact that, in the final decree in the Government's prosecution, this Court held that the Terminal was an illegal combination in restraint of trade and that it could only continue to exist if it stopped discriminating between proprietary and

nonproprietary lines, and if the east-side lines stopped the practice of having their rates break on the east side of the river, which the Court, in this case, approved, thus overruling, by implication, the very wholesome decision of this Court in the case of

> United States v. Terminal Railroad Association of St. Louis, 224 U. S. 383.

In admitting, in its opinion in this case, that

> "this competition for the haul between East St. Louis and the territory west of St. Louis compelled the four appellee lines to bear the cost of transferring across the river all through traffic in both directions,"

the Court concludes that a discriminatory practice, which was expressly condemned as against public policy in this Court's opinion in the Government's case (224 U. S. 383), could be legalized because such discrimination was agreed to by the Western carriers *before the construction of the terminal* and prior to the decision of this Court that such discrimination was an illegal practice which would justify the dissolution of the Terminal.

After mentioning the fact that the east-side lines had published

> "the same rates from and to St. Louis as from and to East St. Louis,"

the Court, in its conclusion that the east-side lines were not estopped by this action in demanding that the west-

side lines should pay the transfer charges over a joint facility on all through westbound business, clearly lost sight of the fact that this Court found (in the 224 U. S. 383) that the rails of the Terminal were but an extension of the rails of the proprietary lines, and that this Court held that the Terminal Association must treat all proprietary and nonproprietary lines alike, or that it should be dissolved as an illegal combination in restraint of trade.

In concluding that the order of the Commission concerned *"no furnishing of facilities or the handling of traffic"* the Court clearly failed to grasp the terms and effect of the order of the Commission, as the thing involved is "the furnishing of facilities" and "the handling of traffic" by a joint facility, which this Court had previously held must be the impartial agent of all the carriers using it in order to justify its continued existence.

In assuming that the practice of the east-side lines in having their rates "break" on the east side of the river was a legal practice, the Court failed to give effect to the express mandate of this Court in the prosecution by the Government, wherein this very practice was condemned, and this Court held that this practice—which had survived the reason for its existence, as the river was no longer a barrier after the construction of the Terminal Company's bridge—furnished the basis for the fourth condition in this Court's decree, reading as follows:

"*Fourth.* By providing for the complete abolition of the existing practice of billing to East St. Louis or other junction points and then rebilling traffic destined to St. Louis or to points beyond."

224 U. S. 411.

In holding that the discrimination of the east-side lines and the Terminal Association against the four west-side lines, whereby they are compelled to defray practically all the expense of operating the Terminal Railroad Association of St. Louis, was not "a practice" within the meaning of the Transportation Act, giving the Interstate Commerce Commission authority over the subject matter of this suit, the Court failed to give effect to the finding of this Court in the prosecution by the Government wherein this Court expressly held that "*the complete abolition of the existing practice of billing to East St. Louis*" should be demanded as a condition of the further existence of the Terminal Association.

For this Court to hold, in the prosecution by the Government, that this was "a practice" which must be abolished, and for this Court, in the present case, to hold that it is not "a practice" within the meaning of the Transportation Act which will entitle four of the proprietary lines to relief, is clearly at variance with this Court's finding in the previous decision in the prosecution by the Government.

After prescribing, as this Court did in the sixth condition in the decree in the prosecution by the Government,

against the illegal association, known as the Terminal Railroad Association of St. Louis, that any of the proprietary lines could apply to the Court or to the Commission for relief, and the final decree, in accordance with this Court's mandate, contained this condition justifying the further continuance of the Terminal Association, the decision of this Court, in this case, that the Commission could not grant relief against the flagrant violation of this Court's decree, clearly denies the appellees the benefit of said decree, in clear violation of the sixth condition prescribed by this Court in its decision in the case of the

United States v. Terminal Railroad Association of St. Louis, 224 U. S. 412.

In concluding that the order of the Commission in this case "*involved divisions or apportionments of revenues derived from through traffic,*" the Court overlooked the fact that the only thing involved was an illegal practice by joint users of a terminal facility, involving only the transfer charge for the use of said facility, where the practice of making four of the users of said facility pay all the expense of operating the same, was in flagrant violation of a decree of this Court rendered fourteen years ago that such practice must be stopped or the illegal combination indulging in such practice would be dissolved as a combination in restraint of trade, in violation of the Sherman Antitrust Act.

224 U. S. 412.

In holding that the four west-side lines must continue to bear all the expense of operating the St. Louis terminals because "*the Alton and other like competitors of appellee lines bear the cost of the transfer across the river,*" the Court overlooks the fact that the Alton is both an east-side and a west-side line, as are the Burlington and the Wabash, and that this practice of the east and west lines, in paying the transfer charge across the river, instead of justifying a further discrimination on the part of the east-side lines, proprietary and nonproprietary, against the four west-side lines, is rather a reason why the illegal practice, condemned by this Court in its decree in 1914, should now be stopped, since the Terminal Association is but an extension of the rails of the east-side lines, as this Court expressly held, just as it is an extension of the rails of the Alton and other competitors of the appellees.

In concluding that the Commission was wrong in assuming that the transfer charges should be paid by the east-side lines in delivering through westbound freight to the west-side carriers, because

> "such a practice does not tend to prove that it is unjust or unreasonable for the appellee lines, in order to meet competition of other west-side lines, to bear the cost of transfer in both directions, *or that the east-side lines may not justly and reasonably limit their rates to East St. Louis,*"

the Court overlooks the fact that this very "practice" was expressly condemned by this Court as unjust and unreasonable, and that this Court, in the fourth condition, annexed to the further existence of the illegal Terminal Association, prescribed

> "for the complete abolition of the existing practice of billing to East St. Louis or other junction points and then rebilling traffic destined to St. Louis or to points beyond."

After this Court annexed the continued existence of the Terminal Association to the abolition of this "practice," for this Court now to assume that this adjudged illegal "practice," because it has been indulged in in the face of this Court's decree for fourteen years, can thus become "just and reasonable," and that, notwithstanding such "practice," the appellee lines are not discriminated against, but are placed upon an equal footing with their competitors, is to overrule this Court's previous decision by implication and deny the appellees a rule of property and leave them remediless in the use of a facility which this Court previously held they were entitled to use upon just and equal terms with all their competitors.

In finally concluding that

> "there was nothing to support a finding that it is or will be unjust or unreasonable for the appellee lines

to bear the cost of transfer of westbound through traffic,"

this Court overlooked the fact that the first condition annexed by this Court in the prosecution by the Government was that all proprietary and nonproprietary lines should be placed

"upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies."

224 U. S. 411.

And, after having thus adjudged that all users of the Terminal, proprietary and nonproprietary, must be placed upon a plane of equality, for this Court to conclude in its opinion in this case, wherein the record is undisputed, that the four west-side lines are compelled to bear all the expense of operating the Terminal upon all through east and west bound traffic, that this practice, condemned by this Court, was not both unjust and unreasonable, is, in fact, to overrule the previous wholesome decision of this Court and to leave the appellees without remedy for the illegal discrimination which this Court previously held

would justify the dissolution of the illegal association unless it should be stopped.

Respectfully submitted,

JOSEPH M. BRYSON,
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EDWARD J. WHITE,
E. T. MILLER,
C. S. BURG,
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Counsel for West-Side Lines, Appellees.

May 31, 1928

State of Missouri, } ss.
City of St. Louis. }

M. G. Roberts, one of the attorneys for the appellees in the above-entitled case, certifies that the above and foregoing petition for rehearing and for modification of the opinion is presented in good faith and not for delay.

St. Louis, Missouri, May 31, 1928.

(Signed) M. G. Roberts.

APPENDIX "A."

REPRESENTATIVE CLASS RATES FROM EASTERN POINTS TO ST. LOUIS, MO., AND EAST ST. LOUIS, ILL., AS OF VARIOUS DATES

(Nash Exhibit No. 72).

CLASS RATES FROM EASTERN POINTS TO EAST ST. LOUIS, ILL., AND ST. LOUIS, MO., AS OF VARIOUS DATES.

Rates in Cents per 100 Pounds

Station From	Date	To East St. Louis, Ill. Classes						To. St. Louis, Mo. Classes					
		1	2	3	4	5	6	1	2	3	4	5	6
Cincinnati, Ohio....	Feb. 1, 1906.....	40	34	25	17	15	12	42	36	26	18	15.5	12.5
	Feb. 1, 1908.....	41	34.5	25.5	17.5	15	12	41	34.5	25.5	17.5	15	12
	July 1, 1922.....	85	72.5	57	42.5	30	24	85	72 5	57	42.5	30	24
	Increase 1922 over 1906...	45	38.5	32	25.5	15	12	43	36.5	31	24.5	14.5	11.5
	Per cent of increase.....	112.5%	113.2%	128.0%	150.0%	100.0%	100.0%	102.4%	101.4%	119.2%	136.1%	93.5%	92.0%
Cleveland, Ohio.....	Feb. 1, 1906.....	51.5	44.5	33	23	19.5	15 5	53.5	46.5	34	24	20	16
	July 1, 1908.....	52.5	45.5	33.5	23	19.5	15.5	52.5	45.5	33.5	23	19.5	15.5
	July 1, 1922.....	103.5	88	69.5	52	36	29	103.5	88	69 5	52	36	29
	Increase 1922 over 1906...	52.0	43.5	36.5	29	16 5	13.5	50.0	41.5	35.5	28	16	13
	Per cent of increase.....	101.0%	98.8%	110.6%	126.1%	84.6%	87.1%	93.5%	89.3%	104.4%	116.7%	80.0%	81.3%
Columbus, Ohio.....	Feb. 1, 1906.....	45	39	30	21	18	14	47	41	31	22	18.5	14.5
	Feb. 15, 1908.....	46	39.5	30.5	21.5	18	14	46	39.5	30.5	21.5	18	14
	July 1, 1922.....	94.5	80.5	63.5	47.5	33	26.5	94.5	80.5	63.5	47.5	33	26.5
	Increase 1922 over 1906...	49.5	41.5	33.5	26.5	15	12.5	47.5	39.5	32.5	25.5	14.5	12.0
	Per cent of increase.....	110.0%	106.4%	111.7%	126.2%	83.3%	89.3%	101.1%	96.3%	104.8%	115.9%	78.4%	82.8%
Detroit, Mich.....	Feb. 1, 1906.....	45	39	30	21	18	14	47	41	31	22	19	15
	Aug. 18, 1908.....	46	39.5	30.5	21	18	14	46	39.5	30.5	21	18	14
	July 1, 1922.....	100.5	85.5	67.5	50.5	35	28	100.5	85 5	67.5	50.5	35	28
	Increase 1922 over 1906...	55.5	46.5	37.5	29.5	17	14	53.5	44.5	36.5	28.5	16	13
	Per cent of increase.....	123.3%	119.2%	125.0%	140 5%	94.4%	100.0%	113.8%	108.5%	117.7%	129.5%	84.2%	86.7%
Indianapolis, Ind....	Feb. 1, 1906.....	37	32	23.5	16	13.5	10.5	39	34	24.5	17	14	11
	Feb. 10, 1908.....	38	32.5	24	16.5	13 5	10.5	38	32.5	24	16.5	13.5	10.5
	July 1, 1922.....	77.5	66	52	39	27	21.5	77.5	66	52	39	27	21.5
	Increase 1922 over 1906...	40.5	34	28.5	23	13.5	11 0	38 5	32	27.5	22	13	10.5
	Per cent of increase.....	109.5%	106.3%	121.3%	143.8%	100.0%	104.7%	98.7%	94.1%	112.2%	129.4%	92.9%	95.5%
Louisville, Ky.....	Feb. 1, 1906.....	40	34	25	17	15	12	42	36	26	18	15.5	12.5
	Feb. 1, 1908.....	41	34.5	25.5	17.5	15	12	41	34.5	25.5	17.5	15	12
	July 1, 1922.....	79	67	53	39.5	27.5	22	79	67	53	39.5	27.5	22
	Increase 1922 over 1906...	39	33	28	22.5	12.5	10	37	31	27	21.5	12.0	9.5
	Per cent of increase.....	97.5%	97.1%	112.0%	132.4%	83.3%	83.3%	88.1%	86.1%	103 8%	119.4%	77.4%	76.0%
New York, N. Y....	Feb. 1, 1906.....	87	75	58	41	35	29	89	77	59	42	35.5	29.5
	Jan. 2, 1908.....	88	76	59	41	35	29	88	76	59	41	35	29
	July 1, 1922.....	166	145.5	110.5	77	66	55.5	166	145.5	110.5	77	66	55.5
	Increase 1922 over 1906...	79	70.5	52.5	36	31	26.5	77	68.5	51.5	35	30.5	26.0
	Per cent of increase.....	90.8%	94.0%	90.5%	87.8%	88.6%	91.3%	86.5%	89.0%	87.3%	83.3%	85.9%	88.1%
Pittsburgh, Pa.....	Feb. 1, 1906.....	55.5	48.5	37	26	22.5	18.5	57.5	50.5	38	27	23	19
	June 20, 1908.....	56.5	49	37.5	26	22.5	18.5	56.5	49	37.5	26	22.5	18.5
	July 1, 1922.....	122.5	104	82	61	43	34	122.5	104	82	61	43	34
	Increase 1922 over 1906...	67	55.5	45	35	20.5	15.5	65.0	53.5	44	34	20	15
	Per cent of increase.....	120.7%	114.4%	121.6%	134.6%	91.1%	83.8%	113.0%	105.9%	115.8%	125.9%	87.0%	78.9%

Source of Information: Exhibit 72, in I. C. C. Docket 16,697.

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SUPREME COURT OF THE UNITED STATES.

No. 404.—October Term, 1927.

The Baltimore & Ohio Railroad Company, et al., Appellants, vs. The United States of America, The Interstate Commerce Commission, The Chicago Rock Island & Pacific Railway Company, et al.	Appeal from the District Court of the United States for the Northern District of Illinois.

[May 21, 1928.]

Mr. Justice Butler delivered the opinion of the Court.

The appellants,[1] for convenience called the east side lines, brought this suit to set aside an order of the Interstate Commerce Commission in respect of charges for transporting certain westbound through traffic from the lines east of the Mississippi at East St. Louis to the lines west of the river at St. Louis. The Commission and the carriers on whose complaint the order was made intervened. The district court, consisting of three judges (U. S. C., Tit. 28, § 47) dismissed the case for want of equity.

The order was made by the Commission after hearing on the complaint of four west side lines. They alleged that the practice of the east side lines requiring them to bear the expenses of transporting

[1]Appellants are: The Baltimore & Ohio Railroad Company; William W. Wheelock and William G. Bierd, Receivers of the Chicago & Alton Railroad Company; Chicago & Eastern Illinois Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Illinois Traction, Inc.; Illinois Central Railroad Company; Litchfield & Madison Railway Company; Louisville & Nashville Railroad Company; Mobile & Ohio Railroad Company; The New York, Chicago & St. Louis Railroad Company; The Pennsylvania Railroad Company; Southern Railroad Company, and Wabash Railway Company.

Appellees are: The Chicago, Rock Island & Pacific Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company, and St. Louis-San Francisco Railway Company.

westbound through traffic across the river is unjust, unreasonable and illegal. They made no complaint as to the eastbound traffic, but they sought to be relieved from such charges on all the westbound through business and prayed reparation on account of such costs borne in the two years preceding the complaint. The Commission filed a report which was made a part of the order. 113 I. C. C. 681. It held—its Chairman and two other members dissenting—that the matter in controversy is a "practice" within the meaning of the Act. It found "that for the future the practice of the east side lines in requiring the west side lines to bear the transfer charges on westbound freight traffic moving through St. Louis and East St. Louis on combination rates which are the same on St. Louis as on East St. Louis will be unjust and unreasonable, and that the just and reasonable practice with respect to such traffic will be for the east side lines to bear or absorb all such transfer charges". The Commission was not convinced that the acceptance by the west side lines of divisions of joint rates did not constitute an acquiescence, tantamount to an agreement on their part to pay a transfer charge on through traffic moved on such rates. But it commended to the carriers a careful study of the divisions of joint rates on westbound traffic with a view to readjustment if necessary to conform to the just and reasonable practice in respect of interchange approved by the report. Reparation was denied.

The order[2] requires no change of divisions of revenues derived from traffic moving on joint rates. It covers only such of the west-

[2] "It is ordered, That the above-named defendants, according as they participate in the transportation, be . . . required to cease and desist, on or before October 12, 1926, and thereafter to abstain from the practice of requiring the above-named complainants together with the Chicago, Burlington & Quincy Railroad Company and the Wabash Railway Company, to bear the charges for transfer services from East St. Louis, Ill., to St. Louis, Mo., on westbound freight traffic passing through both points on combination rates which are the same on St. Louis as on East St. Louis.

"It is further ordered, That said defendants, according as they participate in the transportation, be, . . . required to establish, on or before October 12, 1926, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of westbound freight traffic passing through both East St. Louis, Ill., and St. Louis, Mo., on combination rates which are the same on St. Louis as on East St. Louis, and delivered to complainants, or the Chicago, Burlington

bound traffic as moves on combination through rates. It shifts from the west side lines to the carriers east of the river the burden of transferring that freight from east to west across the river. No change is ordered in the method of handling the traffic. No lack of facilities for the through routes, § 1 (3) (4), or for making the transfers, § 3 (3) was shown or found.

The appellants contend that the controversy involved rates and divisions and not a "practice" within the meaning of the Act, and that the evidence before the Commission was not sufficient to support a finding that it is or will be unjust or unreasonable to require the west side lines to bear such transfer charges or to warrant the order.

The traffic at this crossing is very large. The railroad lines of the east side carriers terminate on the east bank, those of the appellee carriers on the west bank, and some carriers have lines on both sides. All, or practically all, of the traffic is handled for interchange between lines east and lines west by the Terminal Railroad Association and its subsidiaries. They are jointly owned or controlled by appellant and appellee lines. The arrangements for their use contemplate equal treatment of all carriers served by them. The proprietary companies have trackage rights over the lines of the Association between St. Louis and East St. Louis, but ordinarily they do not use them. The average haul for transfer across the river is about ten miles. The cost is higher than that attending transportation for like distances under ordinary circumstances.

The transfer charges complained of were assumed by appellee lines in order to enable them to compete with other railroads west of the Mississippi River. At first there was a separate rate or charge for the haul across the river. But in 1877, the Chicago & Alton Railroad Company built a line from the west across the Mississippi at Louisiana, Missouri, to a junction with its north and south line east of the river. That extension enabled it to open a route from the west to East St. Louis and there interchange with

& Quincy Railroad Company or the Wabash Railway Company, the practice of bearing or absorbing on such traffic the charges for transfer services from defendants' lines in East St. Louis, Ill., to the lines of complainants, or of the Chicago, Burlington & Quincy Railroad Company or the Wabash Railway Company in St. Louis, Mo."

the east side lines. This competition for the haul between East St. Louis and the territory west of St. Louis compelled the four appellee lines to bear the cost of transferring across the river all through traffic in both directions. The Commission's report shows that now five of the eight lines on the west side that serve St. Louis also reach East St. Louis, and that three of them handle freight traffic to points west of the river without taking it through St. Louis. This is competition that must be met—if they would participate in the business—by the west side lines that reach East St. Louis only by means of the facilities and services of the Association and its subsidiaries. Since the Alton opened its route to the west, the appellee lines have maintained the same rates from and to East St. Louis as from and to St. Louis. And, about 1908, upon the insistence of the business interests of St. Louis, the lines east of the river published and have since maintained, with some exceptions that need not be specified, the same rates from and to St. Louis as from and to East St. Louis. This was done by reducing the rates to and from St. Louis and by advancing most of the rates to and from East St. Louis. The decrease in revenue resulting from the reductions was much greater than the increase arising from the advances.

In 1905 the United States brought suit against the Terminal Railroad Association, carriers involved in this controversy and others in the district court for the eastern district of Missouri to prevent violations of the Sherman Anti-trust Act. A final decree in favor of the United States was entered in 1917 in accordance with the directions of this Court. 224 U. S. 383, 236 U. S. 194. On petition filed in that case by the appellee lines some years after the final decree, the district court, February 8, 1923, adjudged that in contempt of its decree the Association, its subsidiaries and proprietary companies, had continuously compelled the appellee lines to pay transfer charges for interchange between them and the east side lines on through traffic in both directions. It directed the east side lines to cease such violations and to pay for the use of the west side lines the total amount of the charges paid by the latter for the transfer of westbound through freight from March 2, 1914, to the date of the order. The east side lines and other companies so adjudged in contempt appealed; and, on October 13, 1924, this Court held that the original decree did not regulate rates, prescribe divisions of joint rates or fix liability

for the transfer charges; that contempt proceedings did not lie to determine the controversy between the east side lines and the west side lines or to require the former to make the payments ordered. *Terminal Railroad Ass'n* v. *United States*, 266 U. S. 17, 29, *et seq.*

The Commission's report states that the question before it was "whether the east side lines or the west side lines should bear the expense incident to the transfer across the Mississippi River from East St. Louis, Ill., to St. Louis, Mo., of practically all carload and less-than-carload through freight originating east of the St. Louis-East St. Louis district and destined west thereof". And the thing ordered by the Commission is the absorption by the east side lines of the transfer charges on westbound through traffic. It directed them to do exactly what the district court required them to do except that the latter's decree related to the past and the order of the Commission relates to the future. The matters in controversy in both proceedings were purely financial. There was no question concerning furnishing of facilities or the handling of traffic.

The larger part of the through traffic interchanged through the East St. Louis-St. Louis gateway moves on joint rates; and, for the purpose of divisions among participating carriers, these rates are deemed to "break" at East St. Louis. Each is made up of an amount to cover the part of the haul east of East St. Louis and an amount to cover the movement between that place and points west of St. Louis. The first amount goes to the lines east and the other, less the transfer charge, goes to carriers west of the river. Through traffic not covered by joint rates moves on through rates made up of combinations of local rates or local and proportional rates to and from East St. Louis. Where the combination on St. Louis is the same as on East St. Louis, the lines east of the river, by appropriate tariff provisions, § 6(1), make their St. Louis-East St. Louis rates apply only to and from East St. Louis. There are some exceptions, but they need not be set forth here. So all the revenues yielded by such rates, without deduction on account of charges for transfer, are retained by the carriers in the territory east of the river. But the Commission's order requires the rates, so by tariff provisions limited to East St. Louis, to be extended to St. Louis. This operates to deduct the cost of transfer from their revenue. In effect it is to require the cancelation of such tariff

provisions, and to authorize a corresponding change in the tariffs of the appellee lines. It results that the controversy before the Commission involved divisions or apportionments of revenues derived from through traffic.

In holding that the matter in controversy is a "practice" within the meaning of the Act, the Commission relied on § 1 (6) and (11) and § 15 (1). Paragraph (6) makes it the duty of carriers to establish just and reasonable regulations and practices affecting classifications, rates or tariffs. Paragraph (11) requires them to furnish an adequate car service and to establish just and reasonable rules, regulations and practices, and declares to be unlawful every unjust and unreasonable rule, regulation and practice in respect of car service. The phrase "car service" is defined by paragraph (10) to include the exchange, interchange and return of locomotives, cars and other vehicles and also the supply of trains used by any carrier. Paragraph (1) of § 15 provides that whenever the Commission shall be of opinion that any individual or joint rate or classification, regulation or practice is or will be unjust or unreasonable, the Commission may prescribe just and reasonable rates, classifications, regulations or practices.

The word "practice", considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it. *United States* v. *Pennsylvania Railroad Co.*, 242 U. S. 208, 229. When regard is had to that rule and the restrictions required to give the word a reasonable construction, it seems quite clear that "practice" as used in the provisions relied on by the Commission, does not include or refer to the method or basis used by the connecting carriers for their divisions of rates or revenues. And this is so whether the revenues are derived from joint rates or from combination through rates.

But even if the matter in controversy were a "practice" within the meaning of the Act, the Commission would not be authorized to set it aside without evidence that it is unjust or unreasonable. Paragraph (6) of § 15 empowers the Commission to prescribe divi-

sions of joint rates, but there must be evidence adequate to justify action. *Brimstone Railroad & Canal Co.*, v. *United States*, 275 U. S. —. *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274. *New England Divisions Case*, 261 U. S. 184. That rule may not be avoided by a broad construction of the word "practice". The record here contains all the evidence that was submitted to the Commission. Its report shows that "the propriety of divisions was not the subject of inquiry and investigation". The appellee lines adopted the policy of absorbing the transfer charges in order to meet competition of the Alton and have since continued to divide joint rates and apply their St. Louis-East St. Louis rates in combination on that basis. There is a strong presumption that the general level of their rates has been adjusted to include reasonable compensation for the services covered by them. The Commission found that appellee lines have long acquiesced in the division of revenue derived from traffic moving on joint rates. They have not, by tariff provisions or otherwise, attempted to limit to St. Louis their St. Louis-East St. Louis rates when used in combination to move through traffic. The Alton and other like competitors of appellee lines bear the cost of the transfer across the river. The order makes no change as to them. But it takes the corresponding costs off appellee lines and puts that burden on the east side lines. The latter are required to absorb the transfer cost only when the traffic moves over the appellee lines.

The Commission appears to have relied on evidence tending to show that, usually when interchange is effected by means of an intermediate carrier, the delivering carrier bears the cost of switching. But such a practice does not tend to prove that it is unjust or unreasonable for the appellee lines, in order to meet competition of other west side lines, to bear the cost of transfer in both directions, or that the east side lines may not justly and reasonably limit their rates to East St. Louis when used in combination on through traffic at that gateway and so put appellee lines on equal footing with their competitors. The same considerations apply in determining the reasonableness of the apportionment of revenues derived from combination rates as govern the divisions of joint rates. The merits of the changes made by the order cannot be determined without a consideration of facts substantially similar to those specified in paragraph (6) of § 15 relating to the division of joint rates. The case was not presented by complainants or considered by the Com-

mission on that basis. There was no evidence to show the amount of revenue required to pay operating expenses, taxes and a fair return on the property of appellee lines or that their rates were not adjusted or were not sufficient to cover the transfer charges in question. There was nothing to support a finding that it is or will be unjust or unreasonable for the appellee lines to bear the cost of transfer of the westbound through traffic. The order cannot be sustained. *Florida East Coast Line* v. *United States*, 234 U. S. 167. *Louis. & Nash. R. R.* v. *United States*, 238 U. S. 1.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.